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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NEW YORK RACING ASSOCIATION INC.

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MOTION OF THE NEW YORK RACING ASSOCIATION INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The New York Racing Association Inc. hereby respectfully moves, pursuant to Rule 42(3) of the Rules of the Supreme Court, for leave to file as *amicus curiae* the accompanying brief in support of the position of appellants in the above-captioned proceeding. Counsel for appellants have consented to the filing of this brief. Counsel for appellees have not consented.

Interests of Amicus

The New York Racing Association Inc. ("NYRA") is a non-profit racing association incorporated pursuant to Section 7902 of the Unconsolidated Laws of the State of

New York (McKinney 1961 & Supp. 1977-78), and owns and operates Aqueduct, Belmont Park and Saratoga thoroughbred racetracks. Since 1973, both the thoroughbred and harness racing tracks in New York State have been under the supervision of The New York State Racing and Wagering Board ("the Board") which superseded two former bodies, the State Racing Commission and State Harness Racing Commission, as the state body supervising horse racing.

NYRA moves to submit this brief because it believes that the decision on appeal holding unconstitutional the statutory procedure affording hearings to suspended harness racing licensees was wrongly decided and, if permitted to stand, will impair the ability of the Board to enforce its rules and regulations and supervise the conduct of its licensees not only at harness racetracks, but at thoroughbred racetracks as well. Unless the opinion below is reversed, there is a significant possibility that the same or similar claims will be asserted against the licensing statute applicable to throughbred racing (New York Unconsolidated Laws § 7915 (McKinney 1961 & Supp. 1977-78)).

NYRA further believes that the court below failed to give sufficient weight to the importance to the vitality of racing of avoiding not merely the fact of impropriety but the appearance of impropriety in its conduct. The court below failed to recognize the decisive importance of the horse drugging rules sought to be enforced in this case to the maintenance of the high degree of public confidence necessary in order for all forms of horse racing to survive, to continue to provide employment for thousands of persons, and to safeguard an important source of public revenue.

NYRA, as a private racetrack proprietor, believes that its views with respect to the imposition of disciplinary

suspensions upon participants in racing for infractions of the rules may be of special assistance to the Court in its consideration of the issues involved in this appeal. Accordingly, NYRA respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE NEW YORK RACING ASSOCIATION INC.

Questions Presented

1. Whether the District Court erred in finding New York Unconsolidated Laws § 8022 (McKinney Supp. 1977-78) unconstitutional as denying due process and equal protection of the laws.

2. Whether the District Court should have abstained from determining the constitutionality of New York Unconsolidated Laws § 8022 pending a construction of that statute by the New York State courts.

Statement of the Case

To avoid repetition, we adopt the Statement of the Case set forth in the brief of the Appellants. We do emphasize, however, that appellee Barchi did not, as provided in § 8022 of the New York Unconsolidated Laws, demand a hearing before the Board. Rather, he immediately commenced this action. Although the District Court enjoined absolutely the enforcement of § 8022 (J.S. 1a-2a*), it nevertheless devoted a substantial portion of its opinion to the particular facts of Barchi's case.

ARGUMENT

The three-judge District Court held that § 8022 was unconstitutional in failing to provide either a pre-suspension hearing *or*, alternatively, a prompt post-suspension hearing or a discretionary stay. The District Court reached a wrong result—and reached it by imposing two unjustified interpretations on the statute under scrutiny:

> —The District Court was unjustified in holding that § 8022 prohibits stays of suspensions. Since, as Judge Griesa makes clear in his concurring opinion (J.S. 22a), the court would have upheld the constitutionality of the statute if it had not prohibited discretionary stays, the decision should be reversed on this point alone.

* References here and throughout in the form "J.S. —a" are to the Appendix to the Appellants' Jurisdictional Statement. References in the form "—a" are to the Appendix.

> —The District Court was unjustified in holding that a prompt post-suspension hearing is not available under § 8022 if one were to be demanded.

I.

Section 8022 Does Not Prohibit Stays and Thus Denies Neither Due Process nor Equal Protection of the Laws.

Although we believe that § 8022 comports fully with applicable constitutional requirements even if read to prohibit stays of license suspensions, we believe that the District Court was completely mistaken in holding that the only possible interpretation of § 8022 is that it expressly prohibits stays.

The District Court's conclusion is based solely on language in the second sentence of § 8022 which provides that pending the hearing and determination (which a licensee may request pursuant to the first sentence of § 8022), "the action of the [Board] in refusing to grant or in revoking or suspending a license shall remain in full force and effect." However, when considered in the context of the total statutory scheme governing harness license suspensions, this language is more reasonably construed as meaning that when a hearing is requested the suspension remains in full force and effect *unless the Board orders otherwise,* especially in light of the District Court's recognition that the Board has an inherent power to stay its own orders* and the Board's interpretation of § 8022 as not prohibiting it from staying suspensions. (34a) Further,

* The Court so recognized by holding that the Board could issue stays of suspensions under the thoroughbred licensing statute (§ 7915 of the New York Unconsolidated Laws (McKinney 1961 & Supp. 1977-78)), not because that statute expressly permits stays, but because it does not prohibit them. (J.S. 17a)

the District Court failed to read § 8022, which relates to the conduct of hearings, together with another statute, § 8010(2) of the Unconsolidated Laws (McKinney 1961), which empowers the Board to suspend licenses.* Consistent with the Board's own interpretation of its powers, nothing in § 8010(2), as is also the case with the correlative thoroughbred statute (§ 7915 of the Unconsolidated Laws (McKinney 1961 & Supp. 1977-78)), prohibits the Board from staying a suspension issued pursuant to the suspension authority granted therein.

Since, as Judge Griesa pointed out in his concurring opinion, the District Court would not have found § 8022 to deny due process or equal protection had it not read the statute to expressly prohibit stays, the decision of the District Court should be reversed in its entirety.

At the very least, this is a classic case for abstention. The District Court, rather than imposing its own interpretation on the statute and rejecting out of hand the interpretation of the Board, should have permitted the New York courts to speak authoritatively to the subject.** *Carey* v. *Sugar*, 425 U.S. 73 (1976); *Bellotti* v. *Baird*, 428 U.S. 132 (1977).

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* § 8010(2) is set out in Appendix A hereto, page 1a.

** Contrary to the view of the District Court (J.S. 10a), the decision in *Tappis* v. *New York State Racing and Wagering Board*, 36 N.Y.2d 862, 331 N.E.2d 697, 370 N.Y.S.2d 922 (1975) did not deal with the question of whether § 8022 prohibits stays or, if so, whether such a prohibition was constitutional. *Tappis* did not even involve § 8022, but involved a different statute and rule, and was a fine, not a suspension case. In fact, the broad discretionary licensing powers of the Board and its predecessor commissions have been confirmed by the New York courts. *See, e.g., Sullivan County Harness Racing Ass'n* v. *Glasser*, 30 N.Y.2d 269, 278-79, 283 N.E.2d 603, 608, 332 N.Y.S.2d 622, 628 (1972).

II.

Section 8022 of the New York Unconsolidated Laws Does Not Deny a Prompt Post-Suspension Hearing.

The District Court failed to give adequate consideration to the nature of the activity which the state regulatory scheme at issue in this case was designed to safeguard. As other courts have recognized, racing is a unique and highly sensitive endeavor, in which there is inherent a significant potential for abuse. Thousands of horses and hundreds of state licensees participate in both harness and thoroughbred racing in New York, millions of dollars are wagered and paid out in pari-mutuel operations on and off the racetracks, and racing is a significant source of state revenue.

The ability of the authorities charged with the responsibility for supervising racing promptly to impose penalties for conduct which threatens the operation and integrity of racing is of vital importance, particularly in the highly sensitive area of drugging. Thus, the power to suspend a licensee, pending a full hearing, is an essential weapon in the state's arsenal to enforce its rules, to deter their infraction, and thereby to maintain the highest degree of safety for horses and riders and also the highest degree of public confidence in a sport in which the mere appearance of impropriety threatens to undermine that confidence.

The District Court cited but ignored the decision of the United States Court of Appeals for the Fourth Circuit in *Hubel* v. *West Virginia Racing Commission*, 513 F.2d 240 (4th Cir. 1975), in which the court, although faced with a nearly identical situation, reached a quite different result. *Hubel* upheld against a due process challenge the 47-day summary suspension, without any availability of a stay, of a licensed trainer prior to a formal hearing under a drugging rule similar to the rule here. Unlike the *Barchi* court,

the *Hubel* court gave proper consideration to the nature of the activity, the purpose of the rule being enforced, and the serious interests of the state and the public which were at stake in the area of illegal drugging of horses. The *Hubel* court stated, with respect to the drugging rule, that:

> "The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. The combination of strict liability, imposed by Rule 793, and immediate suspension without the possibility of stay, deters tampering and promotes care. The combination also removes from racing those who have proved either unable or unwilling to protect their horses from unauthorized drugs." *Hubel, supra,* 513 F.2d at 243.

Judge Winter, writing for the court, went on to explain why the court believed the mandatory denial of stays of suspensions to be justified in the context of illegal drugging:

> "Should the offense of 'doping' a horse be committed, whether by intentional act of his handlers or negligence in protecting him from the depredations of outsiders, the offense is so serious and the consequences so severe that absolute protection to the horse and to the public is fully warranted until the matter can be formally resolved. The public is entitled to protection from the continuing danger that one who participates in drugging his horse will do so again, and that one who fails to protect his horse from drugging by others will repeat his negligence. We hold that these considerations justify the mandatory denial of a stay of any suspension for violation of the rules pending the notice and hearing that the due process clause requires." *Hubel, supra,* 513 F.2d at 244.

Although the District Court speculated that Barchi might suffer loss of income for 15 days,* it failed to recognize that the very existence of drugging creates a non-remedial situation for the public. In nearly all cases, as in this case, the results of drug tests are not available until long after the race has been run and the pari-mutuel pool paid out.

No such considerations were even discussed by the *Barchi* court. Instead, the District Court seemed to focus on the period of 16 days that elapsed in the instant case between discovery of the drugging and Barchi's suspension. Just why this fact assumed so much importance in the view of the court is unclear, since Barchi suffered no loss of privileges or livelihood during such period. Moreover, the court found the statute unconstitutional on its face, not as applied to Barchi. The mere delay by an enforcing agency in imposing a sanction in a single case does not support the court's holding that the statute is unconstitutional on its face. In fact, such a delay strongly suggests that the enforcing agency is acting with that deliberate care which characterizes due process.

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* The non-party trainer's affidavit (39a-40a) referred to by the District Court (J.S. 7a) offers no basis for holding out the spectre of a blighted career as flowing from a 15 day suspension. In our experience, trainers who are otherwise qualified do not permanently lose horses previously under their care following a suspension of such brief duration.

The confusion of the District Court's opinion is further highlighted by its holding that § 8022 failed to provide for either a pre-suspension or a prompt post-suspension hearing, despite the fact that the polygraph tests, one of which was "administered . . . at the behest of the [Board]" (J.S. 6a-7a), and discussions of the incident between Barchi and a representative of the Board prior to his suspension afforded Barchi the "opportunity for informal consultation with designated personnel empowered to correct a mistaken determination [that] constitutes a 'due process hearing' in appropriate circumstances." *Memphis Light, Gas and Water Division* v. *Craft*, 46 U.S. L.W. 4398, 4402 n.17 (U.S. May 1, 1978), citing *Goss* v. *Lopez*, 419 U.S. 565, 581-84 (1975) and Friendly, *Some Kind of Hearing*, 123 U.Pa. L.Rev. 1267 (1975). The court itself recognized the significance of the pre-suspension contacts between Barchi and the Board representative, but saw them only as tending to demonstrate his "innocence". (J.S. 16a)* The unique result below is that Barchi, who was himself afforded precisely that form of pre-suspension confrontation indicated by prior decisions of this Court, and who failed to request a hearing, succeeded in obtaining an injunction against the statute on the ground that it afforded him neither a pre-suspension hearing nor a prompt post-suspension hearing.

The District Court apparently recognized that summary suspensions would not violate due process if the statute per-

* Even if Barchi's innocence in the drugging was at all relevant to the determination of the constitutionality of the statute, the court ignored the fact that Barchi was *also* suspended under Rule 4120.6 of the Board, which imposes upon him the duty to "guard . . . each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug . . . or other substance resulting in a positive test." (J.S. 5a) Barchi's polygraph tests in no way absolved him from failure to properly protect his horses.

mitted a "*prompt* post-suspension hearing." (J.S. 16a) (emphasis in original). In finding the statute unconstitutional, however, the District Court erroneously concluded that the statute failed to provide for a prompt post-penalty hearing and that its operation with respect to this plaintiff would necessarily have deprived him of such a hearing.

In the first place, there is nothing in the language of the statute which would prevent the Board from affording a suspended licensee a hearing with the utmost expedition, consistent with the nature and extent of the sanction and the readiness of the licensee to proceed. On the contrary, the statute requires that the Board, upon request for a hearing by the affected person, "shall give prompt notice of a time and place for such hearing." To be sure, the statute imposes an outer limit of thirty days for the Board to make a final written decision. But the statute does not prevent a decision from being rendered within a shorter time period where necessary and appropriate to afford a licensee the meaningful hearing with which the District Court was properly concerned.* Indeed, Counsel to the Board advised the District Court that "where no stay is given, a prompt hearing is always offered" (Affidavit of John M. Dailey, Appendix p. 34a).**

In reaching its decision, however, the District Court ignored the fundamental jurisprudential tenet that statutes are to be construed in a manner consistent with constitu-

* Similarly, the provision in § 8022 permitting continuances of hearing "from time to time for the convenience of any of the parties" cannot be read to preclude a prompt hearing. Such provision protects the licensee who may need a continuance to seek out evidence or witnesses or otherwise prepare his case.

** The trainer-plaintiff in one of the two companion cases which were held in abeyance pending the decision in *Barchi* (*see* opinion of the District Court at J.S. 6a), "was offered a hearing within 48 hours and refused it". (34a)

tionality whenever possible. *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); *Driscoll* v. *Edison Light & Power Co.*, 307 U.S. 104, 115 (1939). Certainly no basis can be found in the present record for concluding that Barchi has been or would have been denied the right to a prompt post-penalty hearing. He never requested a hearing of any kind. His only response to the order of suspension was the institution of the instant action two days later. By his own failure to act, Barchi declined to set into motion the mechanism for the "prompt post-penalty hearing" which was available to him under § 8022, and which the Board indicated it was prepared to give him. The short of it is that § 8022 on its face does not deprive any sanctioned licensee of due process, nor is there any basis for finding the statute unconstitutional as applied to Mr. Barchi who never even invoked it.

CONCLUSION

The judgment of the District Court should be reversed on the merits, or, in the alternative, the judgment should be vacated and the District Court directed to abstain from a decision pending construction of § 8022 of the New York Unconsolidated Laws by the New York State courts.

Dated: New York, New York
May 22, 1978

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APPENDIX

APPENDIX A

§ 8010. Licenses for participants and employees at harness race meetings

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2. If the state harness racing commission shall find that the experience, character and general fitness of the applicant are such that the participation of such person in harness horse race meets will be consistent with the public interest, convenience and necessity and with the best interests of racing generally in conformity with the purposes of this act, it may thereupon grant a license.

Without limiting the generality of the foregoing, the commission may refuse to issue a license, pursuant to this section, if it shall find that the applicant (a) has been convicted of a crime involving moral turpitude; (b) has engaged in bookmaking or other form of illegal gambling; (c) has been found guilty of any fraud or misrepresentation in connection with racing, breeding; (d) has been found guilty of any violation or attempt to violate any law, rule or regulation of racing in any jurisdiction for which suspension from racing might be imposed in such jurisdiction; (e) or who has violated any rule, regulation or order of the commission. The commission may suspend or revoke a license issued pursuant to this section if it shall determine that (a) the applicant or licensee (1) has been convicted of a crime involving moral turpitude; (2) has engaged in bookmaking or other form of illegal gambling; (3) has been found guilty of any fraud in connection with racing or breeding; (4) has been guilty of any violation or attempt to violate any law, rule or regulation of any racing jurisdiction for which suspension from racing might be imposed in such jurisdiction; (5) or who has

Appendix A

violated any rule, regulation or order of the commission, or (b) that the experience, character or general fitness of any applicant or licensee is such the participation of such person in harness racing or related activities would be inconsistent with the public interest, convenience or necessity or with the best interests of racing generally.

• • •